In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-776

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., APPELLANTS

v.

LT. ROBERT C. BALLARD, U.S.N.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANTS

Respondent contends that the difference in selection out procedures reflected in 10 U.S.C. 6382(a) and 10 U.S.C. 6401 bears no rational relation to the needs of the service or to fair treatment of the individuals involved.

As discussed in our main brief, the difference in treatment results from the suspension of the normal time-in-grade provisions for male line and certain staff officers due to the continuing national emergency, and the resultant need for a rapidly expanding and effective fighting force.[1]

[1] It may seem anomalous that the need for a large force results in faster separation of those affected. However, the basic

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Congress recognized that the changing needs for male military officers—from whose ranks officers serving on combat vessels must be drawn—might require suspension of normal time-in-grade provisions for these officers in times of national emergency. 10 U.S.C. 5785. In fact, the provisions relating to time-in-grade for eligibility for promotion for these officers (10 U.S.C. 5751) are currently suspended by virtue of Executive Order No. 11437, Dec. 2, 1968, 33 Fed. Reg. 17945. This has the effect of enlarging the pool of lieutenants available for promotion to lieutenant commander, and thus permitting the rapid promotion of highly qualified officers. But the decision of the court below substantially interferes with this effect, since it requires retention in that pool of officers who have twice been determined to be less qualified for promotion than their peers. The decision thus results in the dilution of the overall quality of the available pool of officers; since less qualified individuals must be retained, more qualifed ones may not enter.[2]

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military promotion and separation procedure, as explained in our main brief, is based on the philosophy that an officer who is not considered by 2 selection boards to be among those best qualified for promotion must be separated, in order both to upgrade the service and to assure vacancies in grade to which those most qualified in the grade below may be promoted. Therefore, any acceleration in promotions necessarily involves a related acceleration in separations.

[2] The practical effect of the decision below—and the subsequent class actions to prevent the separation of naval lieutenants who were passed over for the second time in June of 1973 (*Ingram* v. *Schlesinger*, Civ. No. 73-257-S, S.D. Calif.) and June of 1974 (*Johnson* v. *Schlesinger*, Civ. No. 74-206-S, S.D. Calif.)—would be to require the Navy, in order to stay within force size limitations, to discharge naval officers in the lower grades

There is no such compelling need to separate women lieutenants appointed under 10 U.S.C. 5590 before the expiration of the 13-year period established by 10 U.S.C. 6401. Since women cannot serve on ships other than hospital ships and transports, or in aircraft engaged in combat missions, 10 U.S.C. 6015, they are ineligible for the jobs which fluctuate most with national emergencies. In addition, the disproportionately small number of female lieutenants subject to 10 U.S.C. 6401 compared to the male lieutenants subject to 10 U.S.C. 6382(a) and the related 6389(a)—about 170 as compared with about 15,000 (Gov. Br., p. 21, Table I)—means that the absolute number of women who may be retained because of the 13 year provision is too small to interfere significantly with the Navy's promotion procedures.

Section 6401, 10 U.S.C., providing that women lieutenants appointed under 10 U.S.C. 5590 are not subject to separation until they have 13 years of commissioned service, serves an important government interest in tending to correct the evident imbalance in the number of female officers as compared to males.[3]

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who were commissioned in the belief that the speed-up for national emergencies was valid. These potentially highly qualified officers would have to be released, in order to retain the lieutenants who have been passed over (App. 25A).

[3] In 1973, there were more than twenty times as many male officers as female (Gov. Br., p. 21, Table 1).

The difference in treatment granted certain women lieutenants is also justified by considerations of fairness to the individuals involved. Restrictions on promotions of women which limited their chances for advancement in the Navy were not removed until 1967 (Gov. Br., p. 19, n. 28). Consequently, the records of many women affected by the 13 year retention requirement of 10 U.S.C. 6401 reflect restrictions which existed until seven years ago.[4]

Moreover, due to the statutory prohibition on service on board combat vessels (10 U.S.C. 6015), many of the jobs available to male officers are still not available to women. In the competition with men for the jobs which are available to them, the women officers' records reflect their current narrower opportunities for service. For both these reasons, women remain at a disadvantage compared to men in obtaining the available line officer jobs in the Navy. The special provision in 10 U.S.C. 6401, permitting certain women lieutenants to serve 13 years before separation for failure to be promoted, is justified as tending to counteract this disparity. In the integrated corps, such as the Medical and Dental Corps, the Judge Advocate General's Corps, and the Nurse Corps, where there is no statutory difference in the jobs which men and

[4] For example, Lt. Two, a woman who challenged the constitutionality of 10 U.S.C. 6401, had eleven years of commissioned service before she was first considered for promotion to Lieutenant Commander. *Two* v. *United States*, 471 F. 2d 287, 288 (C.A. 9), certiorari denied, 412 U.S. 931.

women officers may fill, there is likewise no difference in the selection out procedures applicable to them (Gov. Br., p. 17, n. 22).

Respectfully submitted.

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Solicitor General.

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